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No. _____

In The

Supreme Court of the United States

Frank Colacurcio, Jr., David Ebert,
and Steve Fueston, d/b/a DDF&S Investment Co.,

Petitioners,

v.

City of Kent,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate level of First Amendment protection for sexually explicit non-obscene speech, and what is the standard for measuring regulations that abridge such speech, assuming it is entitled to lower protection than other forms of expression?

2. What are the evidentiary standards for determining a government's true "predominate purpose" when deciding whether a regulation is content-based or content-neutral under the First Amendment?

3. What is the meaning of the intermediate scrutiny test's "narrow tailoring" requirement in the context of regulations of sexually explicit, non-obscene speech?

4. May a trial court grant summary judgment to a government in a First Amendment challenge in the face of uncontroverted evidence that the regulation forecloses an entire unique medium of expression, as well as substantial evidence that the regulation's "predominate purpose" was the suppression of speech?

RULE 29.6 LISTING

DDF&S Investment Co. has no parent corporation, and no publicly held company owns ten percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Frank Colacurcio, Jr., David Ebert, and Steve Fueston, d/b/a DDF&S Investment Co. (collectively, "Colacurcio") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 163 F.3d 545 and can be found at Appendix A. The memorandum order of the district court granting Respondent's Motion for Summary Judgment is reported at 944 F. Supp. 1470 and appears at Appendix B. The Order of the court of appeals denying the petition for rehearing is unpublished and appears at Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on December 8, 1998. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on March 26, 1999. This Petition is timely filed within ninety days of that date as provided in Supreme Court Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves portions of the First Amendment to the United States Constitution, which in pertinent part provides as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .

This case also involves the City of Kent's Adult Entertainment Ordinance, Kent City Code ("KCC") Chapter 5.10, which in pertinent part states, "No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron." The entire ordinance appears at Appendix D.

STATEMENT OF THE CASE

Petitioners sought to open a non-alcoholic adult nightclub in the City of Kent, Washington, (the "City") that was to feature nude and semi-nude stage dancing and semi-nude table dancing.[1] A table dance is an erotic dance commonly performed in close proximity to the patron and is featured in many adult nightclubs throughout the United States. At the time, *nude* table dancing was prohibited, but table dancing with a full bikini was permitted.

Petitioners found a site for their nightclub, but the City refused to process the permit because the parcel had been incorrectly zoned for adult entertainment. Petitioners then challenged the constitutionality of the City's adult entertainment zoning ordinance in federal court. The district court ruled that the zoning ordinance violated the First Amendment because it permitted adult entertainment on only one site in the entire City of Kent. The parties then entered into a settlement agreement, which the district court approved on August 25, 1994. The settlement agreement required the City to treat Petitioners' proposed business activity as a lawful non-conforming use. *See* App. A at A-2 to A-4.

Immediately after the settlement agreement, the City Council declared a moratorium on adult business permits. Though the settlement precluded the City from applying the moratorium to Petitioners, the City Council simultaneously began consideration of amendments to its existing adult entertainment *regulatory* scheme. A mere six months after the successful challenge to the zoning ordinance, the City adopted amendments to the City Code that had the effect of imposing a *complete* ban on table dancing, including table dancing with a full bikini.

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[1] Though laws around the country have a variety of different definitions of "semi-nude," Petitioners use the term in this Petition to mean that female dancers would be wearing at least both halves of an opaque bikini.

As amended, Kent City Code ("KCC") § 5.10.110 A and § 5.10.120 A(2) require "[a]ll dancing and adult entertainment [to] occur" on "a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas." KCC § 5.10.120 A(3) provides as follows: "No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron." App. D at D-26 to D-28. Petitioners then filed a second action in the district court arguing that the complete ban on table dancing – in particular, the ten-foot distance requirement – violates the First Amendment. At the end of discovery, the City moved for summary judgment.

In opposition, Petitioners presented evidence demonstrating that the City's predominate purpose in enacting the amendments was to undermine the court-approved settlement and to prevent all adult entertainment businesses, including Petitioners', from locating in Kent. In addition to the fact that the amendments were passed soon after the settlement and in conjunction with a temporary moratorium on all adult businesses, Petitioners provided direct evidence of the City's true purpose: minutes of the City Council and the City Council's Planning Committee meetings showing that the Mayor and City Council members did not want to comply with the district court's decision invalidating the zoning ordinance. The official minutes of the City Council meeting on December 19, 1995, for example, state that "Mayor White . . . said that . . . he does not personally support adult entertainment businesses and *does not want any in Kent*" (emphasis added).

The minutes also reflect that the Council members and the City Attorney knew (1) that table dancing is the primary means by which adult nightclubs earn revenue, (2) that a ban on table dancing would pose an insurmountable economic obstacle to the opening of an adult nightclub, and (3) that the amendments to the regulatory ordinance would serve as an effective alternative to exclusionary zoning so as to bring about a complete ban on adult entertainment. For example, in one Planning Committee meeting, the City Attorney stated, "*Since we cannot zone these type of businesses out of the City*, the licensing was looked at that was in place for this type of

facility" (emphasis added). At his deposition, he then testified that he knew that the proposed amendments would have an adverse economic impact on the adult nightclubs. At a Planning Committee meeting on April 10, 1995, one of the Committee members stated, "Everybody's talking about this business license practice Ordinance that [the City Attorney has] written, and it's a beaut. And if it holds up, *nobody's going to want to come to this City*" (emphasis added). At the same meeting, the Chairman of the Committee stated: "With all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. *Because we've made it a little bit difficult for them to make money in the traditional way they make money*" (emphasis added). *See generally* App. E at ¶¶ 28-37.

Petitioners also presented uncontroverted expert evidence that table dancing is a unique medium of expression distinct from stage dancing, that it is performed throughout the United States, and that distance between patron and entertainer is an expressive component of the dance. Dr. Judith Hanna, a Senior Research Scholar at the University of Maryland, and the author of four books and eighty scholarly articles on the anthropology of dance, provided a declaration stating that requiring the dancers to maintain a ten-foot distance "directly and unmistakably affects the *content* of the erotic message sought to be conveyed by the performer." App. F at ¶ 23 (emphasis added). Petitioners also presented the declaration of Dr. Edward I. Donnerstein, chairman of the Communications Department at the University of California at Santa Barbara, and the lead social scientist called to give expert testimony before the Meese Commission on Pornography, who conducted an original study of the impact of entertainer-patron separation on audience perception of erotic dance performance. The study demonstrated that distance between entertainer and performer constitutes an expressive component of the dance. App. G.

Petitioners also presented evidence of their attempt to open an adult nightclub in Bellevue, Washington, similar to the one proposed for Kent. Bellevue had adopted an ordinance requiring entertainers to perform four feet from the nearest

patron. Petitioners attempted to comply with the Bellevue Ordinance but were forced to close their business because, without table dancing, the business could not generate sufficient revenue to cover expenses. Petitioners presented evidence that the impact of the four-foot rule in Bellevue, and a similar restriction in the City of Federal Way, Washington, was to reduce substantially both the number of entertainers willing to work in the nightclub and the number of patrons willing to attend the performances. Kent's ban on table dancing, together with Petitioners' experience in Bellevue and the experience of another club in Federal Way, led them to decide not to exercise their option to purchase the parcel in Kent. *See* App. A at A-23.

The district court held that Petitioners' submissions failed to raise a genuine issue of material fact and granted the City's Motion for Summary Judgment, finding the Ordinance to be content-neutral and valid under the intermediate scrutiny test. App. B.

A divided panel of the Ninth Circuit affirmed. App. A. The court of appeals held that the ten-foot rule was content-neutral because the ordinance's purpose was to "ameliorate secondary effects," *id.* at A-11, and was therefore "justified without reference to speech," *id.* at A-13 to A-14. Applying the intermediate scrutiny test, the court held that "the ten-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression." *Id.* at A-25. Judge Reinhardt dissented, concluding that Petitioners had raised a genuine issue of material fact as to whether the regulation was content-neutral by providing evidence that "stage dancers and table dancers communicate different expressive content in their respective messages" and, therefore, that "proximity itself – the distance, or lack thereof, between the dancer and the patron – is integral to the message conveyed by table dancing." *Id.* at A-27 (Reinhardt, J., dissenting). Petitioners then sought rehearing and rehearing *en banc*, and both requests were denied. App. C.

REASONS THE WRIT SHOULD BE GRANTED

This Petition should be granted because the Ninth Circuit's opinion conflicts with decisions of this Court and other courts of appeals, and raises important and unsettled questions of First Amendment doctrine, both in general and as the First Amendment relates to sexually explicit, non-obscene expression.

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT BUT UNSETTLED QUESTIONS OF "WHAT IS THE APPROPRIATE LEVEL OF FIRST AMENDMENT PROTECTION FOR SEXUALLY EXPLICIT NON-OBSCENE SPEECH?" AND "WHAT IS THE STANDARD FOR MEASURING REGULATIONS THAT ABRIDGE SUCH SPEECH, ASSUMING IT IS ENTITLED TO LOWER PROTECTION THAN OTHER FORMS OF EXPRESSION?"

A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question.

The Ninth Circuit recognized, as have many courts in recent years, that the standard of review applicable to government restriction of sexually explicit, non-obscene expression remains unclear: "The fragmented nature of Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression." App. A at A-5; *see also* Laurence Tribe, *American Constitutional Law* § 12-18, at 938 (2d ed. 1988) ("[N]o Court has yet squarely held that offensive or sexually explicit but non-obscene speech enjoys less than full first amendment protection."); *cf.* Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4 (1997) (referring to sexual speech as "protected, but low value"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 473 n.162 (1996) ("[S]exually explicit

speech [other than obscenity and child pornography] is entitled to less than a full measure of constitutional protection, although the precise standard is uncertain.").

B. The Several Opinions in This Court's Decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), Have Resulted in Confusion in the Lower Courts.

This Court's 5-4 decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), contains four separate opinions. Under the "narrowest grounds" rule for determining the holding of a case with no majority opinion, *see Marks v. United States*, 430 U.S. 188, 193 (1977), different lower courts have gleaned different holdings from *Barnes*. Other than concluding that the statute at issue in *Barnes* is constitutional,[2] there is little else on which courts agree about the case's holding. As one court put it, "the *Marks* rule is less useful where, as [in *Barnes*], no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

Most courts treat Justice Souter's concurring opinion in *Barnes*, in which he upholds Indiana's public indecency statute as a valid regulation of secondary effects, as controlling authority. *See, e.g., J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998); *Triplett Grille*, 40 F.3d at 134-35; *International Eateries of Am., Inc. v. Broward County*, 941 F.3d 1157, 1160-61 (11th Cir. 1991). Some courts, however, have adopted the principal opinion authored by the Chief Justice as controlling. *See Nakatomi Invs., Inc. v. City of Schenectady*, 949 F. Supp. 988, 998 (N.D.N.Y. 1997). At least one court has even found the *Barnes* decision to be so fractured that it followed the dissent. *See Pap's A.M. v. City of*

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[2] Indeed, one court has even questioned this. *See Pap's A.M. v. City of Erie*, 719 A.2d 273, 278-79 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

Erie, 719 A.2d 273, 279-80 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161).

It appears that a number of courts have followed Justice Souter's opinion in part because they have misread Justice Scalia's concurrence in *Barnes*. Courts have assumed that the fact that Justice Scalia was unwilling to subject Indiana's public indecency statute to any First Amendment scrutiny at all means that he believed that nude dancing was not entitled to First Amendment protection. *See Farkas*, 151 F.3d at 904 (referring to the "major premise" of Justice Scalia's opinion as being "that nude dancing is not an expressive activity that warrants constitutional protection"); *Triplett Grille*, 40 F.3d at 133 ("Justice Scalia . . . concluded that nude dancing is not inherently expressive activity entitled to First Amendment protection."). This is a misreading of his opinion. *See Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128, 1140-41 (W.D. Wis. 1998). Justice Scalia's opinion in *Barnes* explicitly left open the question whether nude dancing was sufficiently expressive to warrant First Amendment protection. *See Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring in the judgment). Moreover, his opinion clearly rested solely on the fact that the law in question was a law of general applicability, not one aimed at expression. Indeed, he made eminently clear that "[w]here the government prohibits conduct precisely because of its communicative attributes," the Court should hold, and consistently has held, the regulation to be unconstitutional.[3] *Id.* at 577. These quotations are in keeping with his view that even the most objectionable expressive conduct is entitled to First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397 (1989) (Justice Scalia joining majority). Indeed, the fact that Justice Scalia concurred in the

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[3] In fact, he even stated that a law of general applicability could be subjected to First Amendment scrutiny if the facts were to warrant: "Were it the case that Indiana in practice targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools . . . , it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." *Id.* at 574.

majority opinion in *Reno v. ACLU*, 521 U.S. 844 (1997), suggests that he is not inclined to characterize non-obscene speech as "low-value" simply because it is sexually explicit. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part) ("It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal."). *But see id.* (expressing view that adult business licensing scheme not subject to First Amendment scrutiny).

In any event, even assuming Justice Souter's concurrence in *Barnes* to be law under *Marks*, such a view still leaves uncertain the level of protection afforded sexually explicit speech where, as here, the law is directly aimed at a particular mode of expression and is thus content-based. In these circumstances, Justice Souter has consistently adhered to the view that such restrictions be subjected to the strictest scrutiny, even where sexually explicit speech is at issue. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, ___, 118 S. Ct. 2168, 2185-96 (1998) (Souter, J., dissenting); *Reno v. ACLU*, 521 U.S. 844 (1997) (Justice Souter joining majority). Where a regulation, such as the ten-foot distance rule in question here, is directly aimed at a particular mode of expression, *Barnes* is less instructive on this fundamental preliminary question. No matter how one reads *Barnes*, therefore, the law regarding the level of protection to be afforded sexually explicit non-obscene expression remains unclear.

C. The Confusion Occasioned by *Barnes* Has Caused Courts to Ignore Other Decisions of This Court.

As a result of the lack of clear guidance on the level of protection afforded such speech, some courts have concluded that laws aimed at adult entertainment are automatically considered content-neutral even if content-based on their face and in their effects. Most courts have relied for this proposition on Justice Souter's opinion in *Barnes* and this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Yet, *Renton* requires courts to make findings of

secondary effects before concluding that a regulation aimed specifically at adult entertainment is "content-neutral." Moreover, this Court's more recent decision in *Reno v. ACLU*, 521 U.S. 844, ___, 117 S. Ct. 2329, 2342-43 (1997), makes clear that restrictions on sexually explicit non-obscene speech can be content-based. Yet, because of the confusion occasioned by the fractured nature of *Barnes*, some courts have in effect read *Renton* to mean that regulations on the adult entertainment business are automatically "content-neutral." *See, e.g., University Books & Video, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364, 1369 (S.D. Fla. 1999) (citing *Renton* for proposition that zoning regulations that distinguish between uses that are sexually explicit and those that are not are content-neutral); *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1143 (N.J. 1998) (concluding that statute restricting advertising by sexually oriented businesses was content-neutral without any evidence of secondary effects)[4], *petition for cert. filed*, 67 U.S.L.W. 3459 (Jan. 5, 1999) (No. 98-1089); *see also Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) (listing cases); *cf. id.* ("a kind of legal fiction has been created that calls regulation of such literature 'content neutral' when what is meant is only that the regulation is constitutionally valid"); Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1265-67 (1995).

In contrast, other courts have held that *Renton* does not eliminate a court's duty to inquire into whether the government has made the findings necessary to establish that its law really was aimed at secondary effects: *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (*en banc*); *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 494 (5th Cir. 1994); *Faraone v. City of East Providence*, 935 F. Supp. 82, 88 (D.R.I. 1996); *Georgia v. Cafe Erotica, Inc.*, 500

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[4] *See id.* at 1152-53 (Stein, J., dissenting) (noting the majority's "wink[ing] at the complete lack of legislative findings supporting" the ordinance); *id.* at 1157 (Stein, J., dissenting).

S.E.2d 574, 575-76 (Ga. 1998); *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 355 n.9 (Ga. 1997); *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279-80 (Pa. 1998); *Connor v. Town of Hilton Head Is.*, 442 S.E.2d 608, 609-10 (S.C. 1994).

In this case, the Ninth Circuit implied that sexually explicit live entertainment is "low value" speech and thus entitled to less protection, *see* App. A at A-26 (Reinhardt, J., dissenting), but left open the question of which *Barnes* opinion is controlling. It is clear from the opinion, however, that the fact that the message involved erotic expression affected the court's analysis.

Even if the Ninth Circuit panel is correct that non-obscene, sexually explicit speech is entitled to a lower level of protection than other expression, this Court should grant certiorari to decide what standards apply. For example, is the standard for judging regulations that abridge sexually oriented expression the one announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), or that stated in *Renton*? Are the *O'Brien* and *Renton* standards the same, or do they differ in the amount of protection they provide? Finally, is the standard for sexually oriented non-obscene expression identical to or different from the one for regulations that abridge commercial speech? *See Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) ("commercial speech" test is "substantially similar" to test for time, place, and manner restrictions). The lack of uniformity has caused the lower courts to apply a host of different standards and has made it difficult if not impossible for local governments and adult entertainment businesses to determine the extent of First Amendment protection.

Finally, this unsettled question is important as evidenced not only by the number of different courts that have addressed it, but also by the fact that this Court has already granted certiorari to decide a related question in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (U.S. May 17, 1999) (No. 98-1161). *See* Robert L. Stern et al., *Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE IMPORTANT AND UNSETTLED QUESTION OF WHAT THE EVIDENTIARY STANDARDS ARE FOR DETERMINING THE GOVERNMENT'S TRUE "PREDOMINATE PURPOSE" WHEN DECIDING WHETHER A REGULATION IS CONTENT-BASED OR CONTENT-NEUTRAL UNDER THE FIRST AMENDMENT[5]

A. The Ninth Circuit Recognized the Law's Lack of Clarity on This Question.

Once again, on an important and determinative question of federal constitutional law, the Ninth Circuit recognized that

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[5] This question necessarily encompasses two analytically distinct, but related, questions: (1) how much evidence of secondary effects does the government need to produce to meet its initial burden to justify its regulation of speech as content-neutral; and (2) assuming the government has submitted sufficient evidence to meet its initial burden, how much evidence must the plaintiff introduce to raise a genuine issue of material fact as to the government's true predominate purpose. Although Petitioners focus on the second of these two questions, this case implicates the first as well. The federal courts of appeals and the state courts of last resort have used different standards in determining whether the government has introduced enough evidence to meet its initial burden to show its predominant purpose is non-speech related. *Compare, e.g., Town of Islip v. Caviglia*, 540 N.E.2d 215, 218-20 (N.Y. 1989) (secondary effects shown by study even though no direct proof), *and Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137, 1143 (N.J. 1998) (concluding that statute restricting advertising by sexually oriented businesses was content-neutral without any evidence of secondary effects), *petition for cert. filed*, 67 U.S.L.W. 3459 (U.S. Jan. 5, 1999) (No. 98-1089), *with, e.g., T & D Video, Inc. v. City of Revere*, 670 N.E.2d 162, 165-66 (Mass. 1996) (evidence relevant only if actually considered by legislators in enacting the ordinance; post hoc rationalizations during litigation not permitted), *and J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 374 (5th Cir. 1998) (language in preamble along with studies from the passage of a previous ordinance three years earlier insufficient to meet government burden).

it could have benefited from this Court's guidance: "The case law has not clarified when secondary effects warrant restriction of speech and how much proof there must be of these effects. Precedent provides no standards for determining when an illicit but inconsequential 'motivating factor' might develop into an illicit and controlling 'predominant purpose.' " App. A at A-10 (citing Erwin Chemerinsky, *Constitutional Law* § 11.3.4.4, at 840 (1997)); *see also Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (noting that "there is a constitutionally significant distinction between an improper motivating factor and an unconstitutional predominant purpose" without explaining how one distinguishes between the two).

B. This Court's Jurisprudence Leaves the Answer to This Question Unsettled.[6]

It is considered black-letter law that "this Court will not strike down an otherwise constitutional statute on the basis of

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The Fifth Circuit's unanimous opinion in *J & B Entertainment* provides a perfect example of a direct conflict with the divided Ninth Circuit decision below. In *J & B Entertainment*, the Fifth Circuit addressed the constitutionality of a 1994 ordinance banning public nudity under the "secondary effects" approach announced by Justice Souter in *Barnes*. In so doing, the court refused to accept as relevant a study done by the city prior to a 1991 zoning ordinance even though there had been no change in the make-up of the City Council in the intervening period. Here, in contrast, not only did the Ninth Circuit consider a study to be relevant when that study contained no evidence of a link between the 10-foot rule and the secondary effects, but it also ignored the fact that the study on which the City of Kent purportedly relied was conducted in 1982, prior to the promulgation of an earlier regulatory scheme and 13 years before the passage of the challenged legislation.

[6] It should be made clear that the facts Petitioners introduced in opposition to the summary judgment motion constituted not only evidence of the intent of individual legislators based on what they said, but also objective facts surrounding the passage of the Ordinance and its actual effect. Thus, the open question here is "when do objective indicators that

an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The clear import of *O'Brien* is that with respect to the First Amendment's Free Speech Clause the "purpose of . . . legislation [is] irrelevant." *Id.* at 385. This general principle, however, is open to much fine-tuning. As put by one court, "Despite the resoluteness with which this 'familiar principal of constitutional law' is typically invoked, courts remain unclear in the strict application of the principle, particularly in the context of First Amendment cases." *Piece Meal Ltd. v. Village of Bellwood*, No. 90 C 7131, 1991 WL 211292, at *7-8 (N.D. Ill. Oct. 10, 1991) (quoting *O'Brien*, 391 U.S. at 383).

The confusion has become more pronounced in recent years because *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), necessarily modified the general rule to some extent by permitting content-neutral analysis of an ordinance that on its face "treat[ed] theaters that specialize in [one type of speech] differently from other kinds of theaters," *id.* at 47, as long as the law was "*justified* without reference to the content of the regulated speech," *id.* at 48 (citation and internal quotations omitted) (emphasis in *Renton*). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is controlling."). In determining whether a regulation is content-neutral or content-based, *Renton* and *Ward* thus ask courts to inquire as to the government's "predominate intent."[7] *Renton*, 475 U.S. at 47. There

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suggest that the government's true purpose is different from the purpose it articulated, combined with evidence that legislators subjectively sought a different purpose, give rise to a factual dispute about the government's true purpose?"

[7] For purposes of the present Petition, Petitioners make no distinction between "purpose," "motive," and "intent." *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Forward: Implementing the Constitution*, 111 Harv. L. Rev. 56, 71 (1997) ("In . . . the simplest and most familiar usage,

can thus be no question that, under *Renton*, government purpose is the central inquiry in determining whether a law is content-based or content-neutral. *See Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (holding that "*Renton* requires an examination of a municipality's motive in enacting the ordinance before examining whether the ordinance is . . . valid"); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 316 (1997) ("The Court's recent free speech jurisprudence . . . contains an increased . . . attention to government purpose . . . especially . . . in the Court's 'content' jurisprudence.").

This raises the question of how to square *Renton*'s insistence that the central focus be the government's predominate purpose with *O'Brien*'s categorical statement that the "purpose of . . . legislation [is] irrelevant." Most courts, including the Ninth Circuit below, assume that in spite of *O'Brien*'s language, *Renton* requires courts to determine the legislature's predominant intent. In other words, the broader principle embodied in *O'Brien*, that the purpose of legislation is irrelevant, is "hyperbole." *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1292 (7th Cir. 1996).

In the inquiry about the government's predominant intent, one thing is clear: When First Amendment free speech

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purpose is roughly coextensive with motive."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 426 n.40 (1997) (noting that this Court has used the terms interchangeably in First Amendment jurisprudence and elsewhere and citing *O'Brien* as one example of this Court treating the terms "motive" and "purpose" as synonymous). This, of course, does not preclude distinctions between these words in other contexts such as, for example, criminal law. So, a "burglar may *intend* to break into a house for the *purpose* of stealing a painting with the *motive* of getting enough money for his family." Leon Friedman, *Purpose, Intent and Motive in Constitutional Litigation*, 596 Prac. L. Inst./Litig. 713, 715 (1998) (emphases added).

rights are at stake,[8] courts must look beyond the government's articulated justification when determining whether a law is "content-neutral." *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (asking whether a law "was *designed* to suppress certain ideas that the City finds distasteful") (emphasis added); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (interpreting *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as permitting inquiry into motive of legislature); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion) ("Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason *must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose.*") (emphasis added); *see also News Am. Publ'g., Inc. v. FCC*, 844 F.2d 800, 809-10 (D.C. Cir. 1984) (citing *Minneapolis Star & Tribune* for the proposition that "[t]he Supreme Court has recently hinted at a readiness to infer censorial intent

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[8] Determining the government's purpose in passing legislation is important not only in free speech cases, but also in other contexts. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (voting district violates Equal Protection Clause if race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (Establishment Clause violation where legislature's "actual purpose" is to promote religion); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993) (opinion of Kennedy, J., joined by Stevens, J.) (inquiry into subjective intent of legislators permitted in Establishment Clause challenge); *United States v. Lovett*, 328 U.S. 303, 313-14 (1946) (law violates Bill of Attainder Clause if its "purpose" was to punish particular individuals).

Though the general question may be the same, different concerns may be implicated by different constitutional provisions. While Petitioners restrict their analysis in this Petition to challenges to government regulations pursuant to the Free Speech Clause, Petitioners do not thereby mean to imply that jurisprudence on the question of government purpose in other contexts is irrelevant.

from legislative history and to invalidate laws so motivated"); *Discotheque, Inc. v. City Council of Augusta*, 449 S.E.2d 608, 609 (Ga. 1994) (referring to ordinance's preamble as "merely self-serving conclusory hearsay" insufficient to sustain the government's burden). This principle applies even if the statute is content-neutral on its face. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645-46 (1994) ("[E]ven a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.") (citing *United States v. Eichman*, 496 U.S. 310, 315 (1990)).

C. The Lower Federal Courts and State Courts of Last Resort Have Articulated Different Answers to This Question.

Lower courts have answered this question in different ways because this Court has never articulated a standard by which to judge how to determine the government's predominate purpose when a statute's challenger raises substantial evidence suggesting that the government's alleged predominant purpose is not its true predominant purpose.

The Fourth Circuit has read *O'Brien* in the way most deferential to the government, deferring to the government as long as a content-neutral governmental interest can be "identifi[ed]." *See Hart Bookstores v. Edmiston*, 612 F.2d 821, 829 (4th Cir. 1979) ("The relevant question under *O'Brien* is not whether the perceived 'legislative motive' for legislation is unrelated to the suppression of free expression, but whether an identifiable 'governmental interest' is so unrelated."); *see also* Alexander M. Bickel, *The Least Dangerous Branch* 209 (1962) ("[A] determination of 'purpose' . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusionary term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view."). The Sixth, Seventh, and Eighth Circuits all permit a more contextual inquiry into governmental purpose than the Fourth, but each of these three

courts arguably has internal conflicts on this question. *Compare Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 386-88 (6th Cir. 1996) (since content-neutral rationale was "voiced in the record and appears in the legislation itself," law is content-neutral), *with DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) ("if the ordinance was intended to destroy the market for adult cabarets, it might run afoul of the First Amendment"); *compare Fraternal Order of Police Hobart Lodge #121, Inc. v. Hobart*, 864 F.2d 551, 554 (7th Cir. 1988) (Posner, J.) (noting that *O'Brien* principle "survives undiminished in cases . . . where the statute or ordinance does not single out particular individuals or groups for benefits or burdens and is not challenged as discriminating on invidious grounds such as race, religion, and sex"), *with Vandenplas v. City of Muskego*, 753 F.2d 555, 560 (7th Cir. 1985) ("In a case where facts implicating the First Amendment were properly alleged, the motives of the members of the town council . . . would presumably be relevant.");[9] *compare Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 861, 863-64 (8th Cir. 1994) (zoning restrictions on adult businesses upheld despite evidence of improper motive and despite the fact that trial judge found "that the city's predominant intent was to hinder or alleviate the operation of . . . adult businesses because of their content"), *with Avalon Cinema Corp. v. Thompson*, 667 F.2d

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[9] Though neither of these Seventh Circuit cases involved a determination of whether a law is content-neutral, both involved allegations that a statute violated the Free Speech Clause because of improper motives on the part of the legislature. In directly addressing the question whether a law is content-neutral, district courts in the Seventh Circuit have rendered arguably conflicting decisions. *Compare Piece Meal Ltd. v. Village of Bellwood*, No. 90 C 7131, 1991 WL 211292, at *8 (N.D. Ill. Oct. 10, 1991) (denying government motion for summary judgment on constitutionality of zoning ordinance partly on basis of evidence that city officials campaigned for two years to prevent plaintiffs from opening adult bookstore), *with Suburban Video, Inc. v. City of Delafield*, 694 F. Supp. 585, 589 (E.D. Wis. 1988) (no inquiry into city council members' real purpose as long as ordinance stated a valid purpose on its face).

659, 662-63 (8th Cir. 1981) (invalidating adult business zoning ordinance partly because it was passed with the goal of preventing the opening of an adult movie theater and bookstore).

Though Petitioners have not found any Second Circuit cases directly addressing the issue, trial courts in the Second Circuit have interpreted *O'Brien* as permitting "objective evidence of intent." *See Goldberg v. Whitman*, 743 F. Supp. 943, 954 (D. Conn. 1990); *see also Somers Realty Corp. v. Harding*, 886 F. Supp. 386, 390-92 (S.D.N.Y. 1995) (while "not go[ing] so far as to hold that no plaintiff could ever establish a First Amendment violation by demonstrating illicit legislative intent," finding insufficient evidence in that case). Though the Fifth Circuit appears likewise not to have addressed this issue directly, a federal district court in Texas has held a regulation of adult businesses to be content-based on the basis of improper motives, striking the law down as a result. *See N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754, 809-12 (S.D. Tex. 1998) (invalidating requirement that distance between adult businesses and protected uses, such as churches and schools, be at least 1500 feet partly on basis of evidence that city council members made statements during council meetings expressing their desire to close down sexually oriented businesses and that they knew that the distance requirement would effectively accomplish that goal). This decision obviously directly conflicts with those courts that preclude all inquiry into legislative motive or those that limit the inquiry to "objective evidence of intent."

State courts have likewise been faced with this question and have answered it in a variety of ways. *See Goldrush II v. City of Marietta*, 482 S.E.2d 347, 356 (Ga. 1997) (evidence that mayor and several council members sought to eliminate nude dancing establishments altogether was insufficient as a matter of law to establish improper intent); *Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 n.2 (N.Y. 1989) (holding that "*Renton* requires an examination of a municipality's motive in enacting the ordinance before examining whether the ordinance is . . . valid"); *Antonello v. City of San Diego*, 93 Cal.

Rptr. 820, 822 (Cal. Ct. App. 1971) ("Where the purpose of a statute is relevant to a determination of its constitutional validity a court, to ascertain such purpose, may examine its immediate objective and ultimate effect as well as events leading up to its passage.").

With respect to the case below, the Ninth Circuit relied on an earlier Ninth Circuit decision, *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), in determining the standards to be applied. In *Foley*, the Ninth Circuit stated, "The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *Id.* at 1297. In the case below, however, the Ninth Circuit interpreted *Foley* as permitting inquiry only as to whether the procedural handling of the Ordinance's promulgation was unusual. It then concluded that, because "the record does not indicate unusual procedural maneuvering on the part of the . . . City governing bodies[,] . . . [o]bjective indicators of illicit purpose are not present here." *See* App. A at A-12.

In so concluding, however, the court effectively ignored the many objective indicators plaintiffs introduced to demonstrate that the government's alleged purpose was in fact a sham: (1) the fact that the City's consideration of the regulatory amendments resulting in the ten-foot rule began immediately after the district court's decision that the City's zoning ordinance was unconstitutional; (2) the fact that the City simultaneously imposed a complete moratorium on all other adult business uses; (3) evidence that City officials sought ways to circumvent the district court's decision; and (4) evidence that City officials knew that table dancing was the primary means by which adult nightclubs earn revenue and that a complete ban would pose an insurmountable economic obstacle to the opening of an adult nightclub.

Rather than grapple with whether this evidence rises to the level necessary to undermine the government's alleged

predominant purpose, the Court below concluded that because "Kent's ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts," and because "[t]he record also includes affidavits . . . documenting the connection between table dancing and illegal sexual activity," Petitioners' evidence was irrelevant. In effect, the Ninth Circuit read *Renton* to mean that as long as the government can point to a study about secondary effects and a supporting affidavit – that is, as long as it can come up with *some* evidence of a content-neutral justification – a challenger can *never* rebut the government's claim, no matter how much evidence the challenger provides. While Petitioners recognize the lack of clarity in the law, the Ninth Circuit's decision in the case below is manifestly mistaken. By insulating legislatures completely when they simply point to minimal evidence, this holding will threaten the basic principles embodied in this Court's First Amendment jurisprudence, that a government may not adopt a regulation of speech "because of disagreement with the message it conveys."

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE UNSETTLED QUESTION OF THE MEANING OF THE INTERMEDIATE SCRUTINY TEST'S "NARROW TAILORING" REQUIREMENT IN THE CONTEXT OF REGULATIONS OF SEXUALLY EXPLICIT NON-OBSCENE SPEECH

Assuming the City's ten-foot rule should be subjected to the intermediate scrutiny test as a content-neutral time, place, and manner regulation, the City had the burden to show that the rule was "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). "Under intermediate scrutiny, the Government may employ the means of its choosing so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest." *Turner Broad. Sys.*

v. FCC, 520 U.S. 180, 213-14 (1997).[10] While laws subject to intermediate scrutiny "are not invalid simply because there is some imaginable alternative that might be less burdensome on speech," *id.* at 217 (citation and internal quotation marks omitted), the fact that the words "narrow tailoring" are used necessarily implies that courts must consider less speech-restrictive alternatives when determining whether the test is satisfied. *See id.* at 218-23 (considering less restrictive alternatives). Indeed, the test as articulated in *O'Brien* makes it perfectly clear that less speech-restrictive alternatives are relevant. *See O'Brien*, 391 U.S. at 377 (government must show "the incidental restriction on alleged First Amendment freedoms is *no greater than is essential* to the furtherance of that interest") (emphasis added).

This Court's "commercial speech" cases have a similar "narrow tailoring" test, placing on the government the "burden to establish a 'reasonable fit' between its legitimate interest . . . [and] the means chosen to serve those interests." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993); *see also Florida Bar v. Went-for-It, Inc.*, 515 U.S. 618, 632 (1995). The "regulation must indicate a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.' The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring in the judgment) (quoting *Discovery Network*, 507 U.S. at 417) (alteration in *44 Liquormart*); *see id.* at 524

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[10] Because of the way in which this principle is stated in *Ward*, courts often ignore the second half of the test and consider a law to be "narrowly tailored" when the law merely "promotes a substantial government interest that would be achieved less effectively absent the ordinance." *DCR, Inc. v. Pierce County*, 964 P.2d 380, 391 (Wash. App. 1998) (citing *Ward*, 491 U.S. at 799). Of course, that part of the "narrow tailoring" prong is little more than a reformulation of the "furthering the government interest" prong.

(Thomas, J., concurring in the judgment) (describing the principal and concurring opinions, which together were joined by seven Justices, as "commit[ing] courts to striking down restrictions whenever a direct regulation (i.e. a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method" of achieving the government's goal).

The question thus arises as to whether the standards articulated in *Discovery Network* and *44 Liquormart* apply when the intermediate scrutiny test is used in the context of non-obscene, sexually explicit speech. At least one court has held that the "reasonable fit" commercial speech standard applies with equal force to the intermediate scrutiny test. *See Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 199 n.29 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996). Given that "commercial speech receives less First Amendment protection than does non-commercial speech," *id.* (citing *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989)), the "narrow tailoring" requirement of commercial speech cases should properly apply. Though this Court has explicitly stated that "the application of the [commercial speech] test [is] 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech," *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987)), it has never applied the "reasonable fit" test to a "content-neutral" regulation under the *O'Brien* test. Lower courts are thus unsure about the standards to apply and, in the case of sexually explicit speech, have universally ignored the *Discovery Network/44 Liquormart* language.

In the case below, the Ninth Circuit refused to consider seriously the most obvious "less burdensome alternative[ ] to reach the [government's] stated goal," *44 Liquormart, Inc.*, 517 U.S. at 529 (1996) (O'Connor, J., concurring in the judgment), a "no touch" rule. Such a rule would prohibit physical contact between the dancers and patrons and would thus be a "direct regulation," *44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring), for achieving the City's goal. *See*

also J.L. Spoons, Inc. v. City of Brunswick, ___ F. Supp. 2d ___, ___, No. 1:99CV0477, 1999 WL 322999, at *9-10 (N.D. Ohio May 20, 1999). Indeed, the way in which the Ninth Circuit casually dismissed Petitioners' argument is instructive, as it provides further evidence of the City's true goal: to prevent communication. The "no touch" rule, the Ninth Circuit concluded, was not a reasonable alternative to a complete ban on table dancing because it "*would permit verbal communication between dancers and patrons*, thereby failing to curtail propositions for drugs or sex." App. A at A-17 (emphasis added). While certainly a government can, and many do, prohibit criminal solicitation, *see, e.g.*, Wash. Rev. Code § 9A.28.030 (1998), requiring persons who wish to converse with each other to remain ten feet apart because they *might* engage in solicitation raises serious First Amendment overbreadth problems independent of the questions this Petition raises as to the Ordinance's complete ban on table dancing.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THE FACE OF UNCONTROVERTED EVIDENCE THAT THE REGULATION FORECLOSED AN ENTIRE UNIQUE MEDIUM OF EXPRESSION, AS WELL AS SUBSTANTIAL EVIDENCE THAT THE PREDOMINATE PURPOSE OF THE REGULATION WAS THE SUPPRESSION OF SPEECH, CONFLICTS WITH DECISIONS OF THIS COURT

It is settled law that dance is protected First Amendment activity.[11] So too are nude and semi-nude dancing. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Presumably,

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[11] Some forms of dance, however, lack the necessary communicative attributes to merit First Amendment protection. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (social dancing not "expressive association" protected by the First Amendment).

ballet, tap, jazz, and modern dance would likewise each be entitled to First Amendment protection, such that a law completely banning, for example, tap dancing while leaving other forms of dance unaffected would be treated as content-based. Similarly, a law that, rather than explicitly prohibiting tap dancing, instead banned dancing with shoes that have metal soles could also be treated as content-based, because such a law would have the effect of imposing a complete ban on tap while leaving ballet, jazz, and most other types of dance unaffected.[12]

The question Petitioners sought answered below was whether table dancing likewise merits separate protection, just as do ballet and tap. The government introduced no evidence on the question. Petitioners, in contrast, introduced two expert affidavits, as well as a detailed scientific study. This uncontroverted evidence established that table dancing is in fact a unique medium of expression, distinct from stage dancing. According to Dr. Hanna's declaration, "the table dancer focuses on an individual audience member . . . to send *a personal message not manifestly intended for the audience as a whole*." App. F. at ¶ 16 (emphasis in original). Such a message makes the individual customer feel "special" and "important." *Id.* In contrast, "[s]tage dances . . . are dances performed on stage for the audience as a whole." *Id.* at ¶ 18. The message conveyed is one of "coldness and impersonality" because "[o]n-stage the dancer is viewed on a pedestal and [is] inaccessible." *Id.*

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[12] Naturally, it may be that the government's interest in the law underlying a complete ban on table dancing is different from its interest in a law underlying a complete ban on tap dancing. The relevance of the analogy Petitioners make nonetheless remains valid: a restriction on a "manner" of dance, such as dancing with metal-soled shoes or dancing within ten feet of one's audience can in effect work a complete ban on a type of dance. If table dancing is a unique form of expression, as presumably tap is, a complete ban on table dancing effected by a seemingly neutral statute must be treated just as would a complete ban on tap effected by a seemingly neutral statute.

If Petitioners are correct, a complete ban on table dancing would be content-based. As the dissenting judge below pointed out, "To the extent that a reasonable trier of fact might conclude that table dancing and stage dancing are qualitatively distinct forms of expression, the ordinance is itself facially content-based." App. A at A-29 (Reinhardt, J., dissenting). Of course, as noted above, *see supra* Part II, there was also a genuine issue of material fact as to the City's predominate purpose, an issue that should have precluded a grant of summary judgment to the City on the issue of whether the regulation was content-neutral.

Moreover, even if the law were treated as content-neutral, the ten-foot rule would fail the intermediate scrutiny test because a law that completely bans a unique medium of expression fails, as a matter of simple logic, to leave open adequate alternative avenues for that protected expression. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (striking down ban on residential signs because there was no adequate substitute and listing cases in which this Court has invalidated ordinances that completely "foreclose an entire medium of expression": *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("distribution of pamphlets"); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) ("handbills on the public streets"); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) ("door-to-door distribution of literature"); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-65 (1939) (same); and *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) ("live entertainment")). One could draw an analogy to a law requiring politicians to remain at least ten feet from those at a political rally (enacted, say, for the compelling governmental interest in maintaining the safety of political candidates). If hand shaking or baby holding or simply speaking face-to-face with a potential constituent could be considered a unique form of communicating, such a law would likewise leave no alternative forms of communication. The analogy goes even further since a candidate's face-to-face contact – as with the table dancer's – might be considered unique because it would give the individual voter the feeling that she or he is "special" and "important," in contrast to the feeling of "coldness and

impersonality" one feels when a political candidate addresses a group from a stage. *Cf. Frisby v. Schultz*, 487 U.S. 474, 486, (1988) (picketing focused upon individual residence is "fundamentally different from more generally directed means of communication").

In spite of Petitioners' uncontroverted evidence, the Ninth Circuit affirmed the district court's grant of summary judgment for the City. The Ninth Circuit concluded that, even assuming table dancing to be a unique medium of expression, Petitioners could not prevail: "[U]niqueness, alone, is insufficient to trigger separate First Amendment protection" because table dancing is, according to the Ninth Circuit, not "so 'uniquely valuable or important [a] mode of communication' as to be without effective substitute." App. A, at A-20 (internal citations omitted). The court based its conclusion on a *reductio ad absurdum* argument, noting that Petitioners' conclusion would imply that " 'lap dancing' . . . in which the nude or semi-nude dancer performs in the patron's lap" would likewise constitute protected expression. *Id.* at A-22.

The court's analogy is instructive, as it suggests that the court's underlying goal was in fact to eliminate table dancing as a form of communication.[13] It is clear from the court's definition of lap dancing that lap dancing is itself improper sexual contact, *see* Wash. Rev. Code § 9A.44.010(2) (1998) – that is, it is *malum per se* and therefore proscribable independent of any secondary effects with which it may be associated. *Cf. Barnes*, 501 U.S. at 572 (principal opinion of Rehnquist, C.J.) (since "governmental interest served by [a public indecency statute] is societal disapproval of nudity in public places . . . [t]he statutory prohibition is not a means to some greater end, but an end in itself"). Table dancing, in contrast, or so we are told by the City and the court below, is being prohibited not simply because it is itself wrongful, but rather because of the secondary effects associated with it. The *reductio ad absurdum* argument made by the Ninth Circuit fails, therefore, for the simple reason that a prohibition on the

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[13] *See also infra* Part III.

"*absurdum*" is permissible even if lap dancing is a unique form of expression. There is thus no "*absurdum*" to which Petitioners' argument leads since Petitioners accept that government can regulate explicit sexual contact even if such contact is expressive. Implicit in the court's analogy, then, is the assumption that table dancing, like lap dancing, is itself improper sexually oriented conduct and is therefore proscribable independent of any secondary effects with which it may be linked. Such a holding, if made explicit, would effectively eviscerate the "secondary effects" doctrine, since it would necessarily imply that expressive conduct is independently proscribable because of its sexual content. This would directly contradict a long line of this Court's cases holding that non-obscene sexually explicit speech is entitled to First Amendment protection. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997).

Ultimately, Petitioners' argument, based on their uncontroverted evidence, is that table dancing is a unique medium of expression. At the very least, however, Petitioners' evidence raised a genuine issue of material fact that should have precluded a grant of summary judgment to the City on the question whether the statute is content-neutral and the question whether the ordinance leaves ample alternative avenues of communication. As the dissenting judge below noted, "Appellants, by producing these declarations, have created a material question of fact regarding whether table dancing is, as . . . the majority conclude[s], merely stage dancing at a 'louder volume,' or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content." App. A at A-29 (Reinhardt, J., dissenting); *see also DCR, Inc. v. Pierce County*, 964 P.2d 380, 396 (Wash. App. 1998) (Armstrong, J., dissenting) (criticizing court's holding that "as a matter of law . . . the 'proximity' of the dance is not an element of the 'content' of the dance"); *cf. Ino Ino v. City of Bellevue*, 936 P.2d 154, 161 (Wash. 1997) (treating the issue as one of fact).

Moreover, this case squarely raises the important issue of whether a court may grant summary judgment for the government in a First Amendment challenge to legislation when the challenger provides uncontroverted evidence that the regulation is in effect "foreclos[ing] an entire medium of expression," *Ladue*, 512 U.S. at 55, as well as substantial evidence that the predominant purpose for which the regulation was enacted was the suppression of protected expression, *Renton*, 475 U.S. at 47. The Ninth Circuit's decision below thus conflicts with a long string of this Court's decisions and, if left to stand, will create law in nine states that undermines fundamental principles from which this Court has never wavered.

CONCLUSION

As the Ninth Circuit explicitly recognized, the law as it currently stands leaves many questions unsettled regarding the application of First Amendment doctrine to non-obscene, sexually explicit expression; the lower courts thus remain confused and in disarray. Where confusion reigns in the First Amendment, expression as unpopular – and, arguably, offensive – as erotic dancing is inevitably suppressed. As Justice Harlan explained, however, "one man's vulgarity is another man's lyric[, and] it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). Petitioners respectfully request that this Court grant the Writ so as to clarify these doctrinal questions, and to do so in favor of protection for a unique medium of expression.

Respectfully submitted,

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